



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11897 / 11898 / 11899

Hearing Date: April 12, 2023
Decision Issued: July 11, 2023

PROCEDURAL HISTORY

On October 17, 2022, the Office of Employment Dispute Resolution issued Rulings 2023-5444, 2023-5445, 2023-5446, 2023-5447 qualifying for hearing three of the four grievances filed by Grievant. On October 24, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled for February 21, 2023 but continued for just cause. On April 12, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Facility's managers removed Grievant from her role as a department head for retaliatory and/or discriminatory reasons?

BURDEN OF PROOF

The burden of proof is on Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Corrections has employed Grievant for approximately seven years. Her highest rank was Lieutenant and she served as the Institutional Training Officer (ITO) at a Facility. Grievant reported to the Acting Assistant Warden who reported to the Acting Warden. The Secretary and Sergeant reported to Grievant.

Grievant was not certified to teach firearms. When employees at the Facility required firearms instruction, another employee such as a Captain had to be removed from the Captain’s regular duties and assist Grievant with training.

As ITO, Grievant was responsible for administering and coordinating all required and discretionary training for the Facility’s security employees. However, on March 23, 2022, Grievant was reassigned to work as a Watch Commander for security staff on night shifts, apparently on a permanent basis.

After filing her grievances, Grievant left the Facility and began working in probation and parole. Grievant applied to work voluntary shifts at the Facility to cover its staffing shortages and to earn extra pay on an ad hoc basis, yet Facility management has categorically rejected her application to cover short shifts on grounds that probation and parole officers are not eligible.

Grievant’s Secretary was supposed to send a personnel file to the Agency’s Academy. Mr. A worked at the Academy. In February 2022, he called the Secretary several times to obtain the file. The Secretary said she had sent the file, but she had not done so. Mr. A contacted the Sergeant and Grievant after he did not receive the file following his multiple requests to the Secretary. On March 9, 2022, Grievant found a missing file in the Secretary’s desk.

On February 23, 2022, Grievant’s Secretary was cursing while speaking on her telephone. Grievant had to interrupt a virtual meeting to speak with the Secretary and tell her to go outside.

Grievant attempted to meet with the Acting Assistant Warden and the Acting Warden but they did not meet with her. Grievant became concerned and wanted to have her concerns resolved so she called the Regional Operations Director who oversaw wardens in the region.

On March 17, 2022, Grievant called the Regional Officer and spoke with the Regional Operations Director's Secretary. Grievant asked the Secretary for a meeting with the Regional Operations Director. At the time of the telephone call, the Regional Operations Director was in a meeting. The Director's Secretary said the Regional Operations Director was in a meeting and would call her back. Approximately five minutes after Grievant called the Regional Operations Director's Secretary, the Acting Assistant Warden called Grievant and repeatedly asked her if she needed anything and said they would meet the following week. Grievant suspected the Acting Assistant Warden called her because she called the Regional Operations Director's office. Grievant called the Regional Operations Director's Secretary and asked if the Acting Assistant Warden had been in the meeting and the Secretary said yes. The Acting Assistant Warden testified that he was not in the meeting with the Regional Operations Director.

On March 23, 2022, Grievant met with the Major and the Acting Assistant Warden. Grievant wanted to issue three Notice of Improvement Needed and a disciplinary group referral. She needed the Facility manager to "sign off" on her request. She believed the meeting was for that purpose. The Major said he was taking over the meeting. Grievant had not met with the Major before. The Major began working at the Facility one month prior to their meeting. The Major said Grievant was being removed as ITO and would be reporting to the night shift in four days. The Major said there were concerns about Grievant's work performance. Grievant was not told that the reason for the change was institutional needs. The Major testified that he did not know Grievant had called the Regional Operations Director's office. Grievant believed that employees normally were given 28 days to report to a new shift. At some point, the Acting Warden told Grievant he decided to move Grievant.

Sergeant R was to replace Grievant as ITO. Replacing Grievant with Sergeant R did not materially improve Facility operations despite the Agency's claim that it did so. This is because Sergeant R did not have all of the certifications that Grievant had. He could obtain additional certifications while working in the position.

On March 24, 2022, Grievant met with the Regional Operations Director by video conference.

Grievant began short-term disability on March 25, 2022. Her email access was removed within 24 hours but Agency policy provided that email access should not be removed until an employee had been out for 30 days, according to Grievant. Grievant returned to work on April 22, 2022.

Grievant met with the Major when she returned. He told her he was sorry for not hearing both sides of the story. He said he could not change things.

Grievant went on short-term disability on May 23, 2022. The Agency did not suspend her email privileges until the 29th day she was on leave. She returned to work on June 20, 2022.

Grievant left the Facility in August 2022 and began working in probation and parole.

The Facility said it would not participate in Grievant's October 2022 evaluation even though she worked there.

The Agency did not take any disciplinary action against Grievant.

Grievant did not seek to be returned to the Facility but sought to continue working overtime at the Facility as needed. She wanted to be reimbursed for short-term disability and offered an apology. She did not want to be subject to further retaliation.

CONCLUSIONS OF POLICY

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"² cause of the alleged adverse action by the employer.³

Grievant engaged in protected activity. On March 17, 2022, Grievant called the Regional Operations Director's office and spoke with his Secretary. Grievant's objective was to meet with the Regional Operations Director to express her concerns about the Acting Warden and other staff at the Facility.

¹ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

² This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

³ See, *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013).

Grievant did not establish a link between her protected activity and the alleged adverse employment actions. The Regional Operations Director did not testify regarding what he might have told the Acting Warden or anyone else at the Facility about Grievant calling his office. The Regional Operations Director's Secretary did not testify about what she told the Regional Operations Director about Grievant's conversation with her. Grievant did not establish that the Major, Acting Assistant Warden, or Acting Warden knew on March 23, 2022 that Grievant had called the Regional Operations Director's office to speak to him. Since Grievant did not establish that the Major, Acting Assistant Warden, and Acting Warden knew or should have known that she engaged in a protected activity, Grievant cannot show they retaliated against her for engaging in a protected activity. Grievant's claim of retaliation must be denied.

There is a difference between making a poor management decision and retaliating against an employee. Grievant has established that the Agency may have made poor management decisions such as not obtaining both sides of the story before moving Grievant from her position. Grievant's concerns about the poor performance of her subordinates appear to be accurate but were disregarded by Facility managers. Grievant's replacement lacked the training the Agency claimed Grievant needed to perform as ITO. Facility managers should have participated in Grievant's annual performance evaluation. Facility managers should have allowed Grievant to work part-time hours at the Facility after she moved to probation and parole. These are poor management decisions, but they were not examples of retaliation because Grievant engaged in the protected activity of calling the Regional Operations Director. The Hearing Officer does not have the authority to correct poor management decisions unless they are also contrary to policy and issues before the Hearing Officer.

Grievant argued that she was discriminated against because she was replaced as ITO with someone less qualified and of a different race. She believed she was being discriminated against because she was forced to move to a new position while the subordinates reporting to her who were performing poorly were allowed to remain in their positions. No credible evidence was presented showing that the Agency acted because of Grievant's protected status such as race. The Hearing Officer believes that the Agency poorly managed Grievant and as a result Grievant felt she needed to leave the Facility.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.